U.S. Chamber of Commerce

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The Honorable Lily L. Batchelder Assistant Secretary (Tax Policy) U.S. Department of the Treasury 1500 Pennsylvania Avenue N.W. Washington, D.C. 20220	William M. Paul, Esq. Acting Chief Counsel Internal Revenue Service 1111 Constitution Avenue N.W. Washington, D.C. 20224

Re: Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions (REG-122793-19)

Dear Assistant Secretary Batchelder and Mr. Paul:

The U.S. Chamber of Commerce ("Chamber") welcomes the opportunity to comment on the new proposed regulations under section 6045 of the Internal Revenue Code,[1] as amended by the Infrastructure Investment and Jobs Act ("IIJA").[2] That law amended the broker reporting provisions under section 6045 to clarify the rules regarding how certain digital asset transactions should be reported by brokers and expand the categories of assets for which adjusted basis reporting is required to include digital assets. The proposed regulations would implement these amendments by requiring brokers to file information returns and furnish payee statements on dispositions of digital assets effected for customers in certain sale or exchange transactions.

The Chamber commends the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") for their diligent efforts to provide taxpayers with an extensive initial package of proposed regulations on the IIJA's information reporting requirements for brokers and digital assets. The proposed regulations are helpful in answering a range of substantive and practical questions regarding the application of these new rules. At the same time, however, there are certain aspects of the proposed regulations that would be highly problematic in their application and warrant reconsideration, if not outright withdrawal. The following comments discuss several

[1] Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions, 88 Fed. Reg. 59,576 (proposed Aug. 29, 2023). Unless otherwise indicated, all textual references to "section" herein are to sections of the Internal Revenue Code of 1986, as amended ("Code").

[2] Pub. L. No. 117-58, Div. H, § 80603, 135 Stat. 429, 1399–1401 (2021).

such aspects of the proposed regulations and provide pragmatic, consensus-based recommendations for addressing them, consistent with the underlying statute and congressional intent.

Background

Section 6045 generally requires a person doing business as a broker to file information returns and furnish payee statements in accordance with regulations for each customer for whom the broker has sold stocks, bonds, or other financial instruments in exchange for cash, showing each customer's name and address, details regarding gross proceeds, the adjusted basis of certain categories of assets sold, and other information as the Secretary of the Treasury may require.[3] Prior to 2021, however, most of the statutory provisions requiring third-party information reporting predated the advent of digital assets and none expressly addressed its treatment.

Recognizing the lack of clarity on how these reporting rules applied to digital asset transactions, Congress included a provision in the IIJA to standardize this basic information reporting by brokers of digital assets for tax purposes. The aim of this provision was to provide more certainty for Americans looking to invest in digital assets like cryptocurrency by ensuring such investors would receive the same tax documents from their brokers as stock or bond investors receive, which in turn would enable them to file their taxes more easily and promote higher compliance.[4] Cryptocurrency is a digital asset that more and more people are investing in, and Congress wanted this to continue in a healthy and sustainable way.[5] Accordingly, Congress amended section 6045 to clarify the rules regarding how certain digital asset transactions should be reported by brokers and expand the categories of assets for which adjusted basis reporting is required to include digital assets. In so doing, however, Congress distinctly envisioned rules for digital assets similar in scope to the existing regime for broker reporting on securities transactions.[6] Treasury

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[3] *See* I.R.C. § 6045(a), (g).

[4] *See, e.g.*, 167 Cong. Rec. S6042 (daily ed. Aug. 8, 2021) (statement of Sen. Wyden).

[5] *See id.*

[6] *See, e.g.*, 167 Cong. Rec. S6095 (daily ed. Aug. 9, 2021) (colloquy of Sens. Portman and Warner) ("The purpose of this provision is not to impose new reporting requirements on people who do not meet the definition of brokers."); *see also* Letter from Sen. Rob Portman et al. to Janet Yellen, Sec'y of the Treasury (Dec. 14, 2021) (confirming that the reporting requirements cover only brokers who enable the transfer of digital assets for consideration—and not other parties that are ancillary to the process unless they are serving in an additional capacity as brokers).

subsequently acknowledged this understanding and confirmed that the forthcoming proposed regulations would be based on similar principles.[7]

Discussion

The Chamber has identified numerous aspects of the proposed regulations that would materially exceed the scope of the existing regime for broker reporting on securities transactions and undermine Congress's goals described above. The following comments highlight several such aspects of the proposed regulations that warrant further attention.

Overbroad Definition of Broker

As amended by the IIJA, section 6045(c)(1) defines a "broker" subject to gross proceeds and basis reporting to include "any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person." The proposed regulations would retain the existing regulations' definition of broker as any person that in the ordinary course of a trade or business "stands ready to effect sales to be made by others."[8] But the proposed regulations would adopt a new and expansive definition of the verb "effect" whereby any person providing facilitative services that effectuate sales of digital assets by customers would be considered a broker.[9] And a "facilitative service" would generally include any service that directly or indirectly effectuates a sale of digital assets.[10]

The Chamber has material concerns about the proposed regulations' expansive definition of "broker," which would contravene both the letter and spirit of the underlying statute. As a threshold matter, the verb "effect" means to bring about or to make happen,[11] which presupposes a causal element: to "effect" a transaction, one must cause it to occur. Attenuated or indirect causation should not suffice. As set forth above, however, the proposed regulations would generally classify as a broker any person providing a service that directly *or indirectly* effectuates a sale of digital assets. Such an expansive definition of "broker" would arguably be an unreasonable (re)interpretation of the statute. It would also contravene Congress's intent to

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[7] *See* Letter from Jonathan C. Davidson, Treasury Assistant Sec'y for Legis. Affs., to Sen. Rob Portman (Feb. 11, 2022) (confirming that the forthcoming proposed regulations would be "based on principles broadly similar to those applicable under current law for broker reporting on securities transactions").

[8] Prop. Treas. Reg § 1.6045-1(a)(1), 88 Fed. Reg. 59,576, 59,631 (Aug. 29, 2023).

[9] *See* Prop. Treas. Reg § 1.6045-1(a)(10), 88 Fed. Reg. at 59,632. This assumes that the person either knows or is in a position to know information about the seller's identity. *See id.*

[10] Prop. Treas. Reg § 1.6045-1(a)(21)(iii)(A), 88 Fed. Reg. at 59,633.

[11] *Effect*, Black's Law Dictionary (11th ed. 2019).

standardize information reporting by brokers of digital assets with existing law for broker reporting on securities transactions.[12]

Application of the proposed regulations' expansive definition of broker would also contravene congressional intent by subjecting intermediaries that process payments in digital assets ("digital asset payment processors") to reporting obligations that are not required of payment processors under existing law. The proposed regulations would appropriately except merchants who regularly sell goods or other property (other than digital assets) or services in exchange for customers' digital assets.[13] But, remarkably, they would not extend this exception to the payment processors themselves—not even to those that merely transmit the same digital assets from buyers to sellers without converting such assets into cash ("marketplace facilitators"). Thus, under the proposed regulations, digital asset payment processors would be required to collect Forms W-8 or W-9 from customers and report transaction details to the IRS. And because traditional cash and credit card transactions are not subject to such burdensome information reporting, finalizing the proposed regulations in their current form would amount to a death knell for the nascent U.S. digital asset payments industry—precisely the opposite of what Congress intended.

Another perplexing aspect of the proposed regulations is that they would require reporting from all parties involved, directly or indirectly, in effectuating the *same* digital asset transaction, even where this would result in duplicative reporting. Here again, this approach would directly contravene existing law principles for broker reporting on securities transactions, under which a "multiple brokers" rule limits reporting of duplicative transactions to the broker that credits the gross proceeds (cash) to the customer's account.[14]

In view of the above, the Chamber respectfully recommends that Treasury and the IRS limit the definition of digital asset broker in the final regulations to include only those persons who *directly* effectuate digital asset transactions. In the alternative, we respectfully urge Treasury and the IRS to expand the exception for merchants who regularly sell goods, other property, or services in exchange for customers' digital assets to also cover digital asset payment processors—including marketplace facilitators. We also implore Treasury and the IRS to mitigate the unnecessary burden of duplicative reporting by incorporating the "multiple brokers" rule available to traditional securities brokers in final regulations.

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[12] *See, e.g.*, Treas. Reg § 1.6045-1(b), Ex. 2(ii) (recognizing the direct–indirect distinction by excluding from the definition of broker under existing law "a person (such as a stock exchange) that merely provides facilities in which others effect sales").

[13] Prop. Treas. Reg § 1.6045-1(b)(2)(viii), 88 Fed. Reg. 59,576, 59,635 (Aug. 29, 2023).

[14] *See* Treas. Reg. § 1.6045-1(c)(3)(iii).

Overbroad Definition of Digital Assets

Another aspect of the proposed regulations that would contravene congressional intent is the expansive scope of their definition of "digital assets" for purposes of reporting under section 6045. Here, the proposed regulations would appropriately provide that a digital asset does not include cash,[15] which would be defined to include U.S. dollars or any convertible foreign currency that is issued by a government or a central bank, whether in physical or digital form.[16] And yet, the proposed regulations would affirmatively exclude from the definition of "cash" so-called stablecoins, which are a form of electronic payment instrument designed to have a stable value relative to another asset or assets, typically a fiat currency (e.g., the U.S. dollar). Under the proposed regulations, therefore, stablecoins would be treated as digital assets subject to the section 6045 broker reporting rules even though their disposition typically would not give rise to any gain or loss.

The treatment of stablecoins as "digital assets" subject to the section 6045 broker reporting rules would be unnecessary for tax administration purposes and inconsistent with congressional intent. Accordingly, the Chamber respectfully requests that Treasury and the IRS affirmatively exclude stablecoins from the definition of digital assets in the final regulations.

Impracticable Implementation Timeline

A third aspect of the proposed regulations that would materially diverge from Treasury's approach under the existing regime for broker reporting on securities transactions concerns their unreasonably short implementation timeline. After Congress amended the existing broker reporting regime in 2008 by introducing new cost basis reporting rules for certain securities, including debt instruments and options, under section 6045, the effective dates for those rules were phased in over a period of more than five years.[17] Conversely, the proposed regulations would require

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[15] Prop. Treas. Reg. § 1.6045-1(a)(19), 88 Fed. Reg. 59,576, 59,633 (Aug. 29, 2023).

[16] Prop. Treas. Reg. § 1.6045-1(a)(12), 88 Fed. Reg. at 59,632.

[17] *See* Energy Improvement and Extension Act of 2008, Pub. L. No. 110-343, Div. B, § 403, 122 Stat. 3765, 3854 (enacted Oct. 3, 2008) (amending the broker reporting rules in section 6045 for certain securities, including debt instruments and options); Basis Reporting by Securities Brokers and Basis Determination for Debt Instruments and Options, 76 Fed. Reg. 72,652 (proposed Nov. 25, 2011); I.R.S. Notice 2012-34, 2012-21 I.R.B. 937 (announcing a delay of the proposed effective dates for reporting for debt instruments and options by brokers and others from January 1, 2013, to January 1, 2014); Basis Reporting by Securities Brokers and Basis Determination for Debt Instruments; Reporting Premium, T.D. 9616, 78 Fed. Reg. 23,116 (April 18, 2013).

brokers to report the gross proceeds from the sale of digital assets effected on or after January 1, 2025, which is just over one year from now.[18]

The proposed effective date of January 1, 2025, would not provide sufficient time for even the most sophisticated, well-resourced digital asset brokers to build and test the systems required to implement the new section 6045 broker reporting rules. Indeed, it is arguably unreasonable to expect that this process could be completed in less than 18 months from the issuance of final regulations. At a minimum, therefore, the Chamber respectfully urges Treasury and the IRS to delay the proposed effective dates by at least one year and to affirmatively announce its intention to do so in published guidance (e.g., a Notice) as soon as possible.

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The preceding comments are by no means exhaustive but represent some of the most acute, widespread concerns among our member companies with respect to the proposed regulations. We respectfully urge Treasury and the IRS to engage with the business community to address these and other issues critical to the future competitiveness of the U.S. digital asset economy. To that end, we would welcome the opportunity to discuss our comments with you or your colleagues in further detail and provide whatever additional information you may require. Thank you for your time and attention.

Sincerely,

Watson M. McLeish
Senior Vice President, Tax Policy
U.S. Chamber of Commerce

cc: The Honorable Ronald L. Wyden, Chairman, Committee on Finance, United States Senate
The Honorable Michael D. Crapo, Ranking Member, Committee on Finance, United States Senate

[18] Prop. Treas. Reg. § 1.6045–1(q), 88 Fed. Reg. 59,576, 59,654 (Aug. 29, 2023). And brokers would be required to report the adjusted basis and the character of any gain or loss with respect to a sale or exchange effected on or after January 1, 2026. Prop. Treas. Reg. § 1.6045–1(d)(2)(i)(C), 88 Fed. Reg. at 59,641.

The Honorable Jason T. Smith, Chairman, Committee on Ways and Means, United States House of Representatives
The Honorable Richard E. Neal, Ranking Member, Committee on Ways and Means, United States House of Representatives
Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation, United States Congress